

PEARSON, J.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	CASE NO. 4:19-CR-56-5
Plaintiff,	)	
	)	
v.	)	
	)	JUDGE BENITA Y. PEARSON
THOMAS BAILEY,	)	
	)	
Defendant.	)	<b><u>ORDER</u></b> [Resolving <a href="#">ECF No. 46</a> ]

Thomas Bailey (“Dr. Bailey” or “Defendant”) was named in an indictment and charged, along with several others, with conspiring to commit health care fraud and conspiring to distribute controlled substances. The day the indictment was made public, the United States made statements about the alleged conduct of those charged.

Offended, Dr. Bailey moved the Court to sanction the Government for “improper public statements made directly to the media.” [ECF No. 46](#). He insists that certain public statements made by Government attorneys and agents and published by the United States Attorney’s Office (“Government’s press release”) were suggestive and inflammatory, and he asks the Court to impose sanctions and take other remedial measures. *Id.* The Government concedes that certain remarks “could have been better stated” but, on the whole, denies that those statements were improper or put Dr. Bailey at risk of receiving an unfair trial. [ECF No. 58](#). Dr. Bailey replied, [ECF No. 60](#). The Court heard oral argument and issues the ruling below.

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## **I. Relevant Law and Guidelines**

### **A. Local Criminal Rule 57.1**

[Local Criminal Rule 57.1](#) requires, in relevant part:

It is the duty of the lawyers associated with the prosecution and defense of a pending or imminent criminal case to refrain from releasing or authorizing the release of information or opinions related to the case if there is a reasonable likelihood that such release will interfere with a fair trial or otherwise prejudice the administration of justice.

The foregoing shall not preclude a lawyer, in the proper discharge of his or her duties, from announcing an arrest (including the name, age, and address of the subject) (including the place of arrest, resistance, pursuit, and the use of weapons), the identity of the investigating officer or agency, the length of the investigation, the announcement of the seizure of property or physical evidence other than a confession, a brief description of the offense charged, the penalty authorized by law, from quoting or referring to the public records of any stage of the judicial process, from requesting further assistance in obtaining judicial process, or from commenting that the accused denies the charges made against him or her.

### **B. Ohio Professional Conduct Rule 3.6**

[Ohio Professional Conduct Rule 3.6\(a\)](#) requires:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

### **C. Justice Manual: Confidentiality and Media Contacts Policy**

The Justice Manual outlines Department of Justice policy. See [§ 1-7.001](#). It does not create substantive rights, but its provisions are helpful nevertheless because they describe the kind of behavior that the Government itself deems appropriate *ex ante*.

[Justice Manual § 1-7.500](#) advises, in relevant part:

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Subject to limitations imposed by law or court rule or order, and consistent with the provisions of this Policy, DOJ personnel may make public the following information in any criminal case in which charges have been brought:

- A. The defendant's name, age, residence, employment, marital status, and similar background information;
- B. The substance of the charge, as contained in the complaint, indictment, information, or other public documents;
- C. The identity of the investigating or arresting agency and the length and scope of the investigation; and
- D. The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized during the arrest.

[Justice Manual § 1-7.610](#) advises, in relevant part:

Because the release of certain types of information could prejudice an adjudicative proceeding, DOJ personnel should refrain from disclosing the following, except as appropriate in the proceeding or in an announcement after a finding of guilt:

- A. Observations about a defendant's or party's character;

\* \* \*

- D. Statements concerning the identity, testimony, or credibility of prospective witnesses;
- E. Statements concerning anticipated evidence or argument in the case; and
- F. Any opinion as to the defendant's guilt . . .

[Justice Manual § 1-7.700](#) advises, in relevant part:

- B. There are circumstances when media contact may be appropriate after indictment or other formal charge, but before conviction. In such cases, communications with the media should be limited to the information contained in publicly available material, such as an indictment or other public pleadings.

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C. DOJ personnel must avoid making public statements that violate DOJ guidelines, regulations, or legal requirements, including those imposed by case law, applicable bar policies, and local court rules.

## **II. The Government's Statements**

As earlier indicated, on the day the indictment charging Dr. Bailey with conspiracy to commit health care fraud and conspiracy to distribute controlled substances was unsealed, the United States Attorney's Office for the Northern District of Ohio issued a lengthy press release relaying the allegations in the indictment and quotations from certain law enforcement officials about the Defendants' bad character and the opprobrium of their alleged crimes. *See* ECF Nos. [1](#), [4](#); [Order, February 7, 2019](#); [ECF No. 46-1](#). A spokesman for the U.S. Attorney's Office also conducted a television interview by telephone, *see* [ECF No. 46 at PageID#: 183](#) (citing the URL hosting that interview), and the Government's statements were reproduced by numerous media outlets. *See* ECF Nos. [46-4](#), [46-5](#), [46-6](#), [46-7](#), [46-8](#).

### **A. Press Release: Allegations Presented as Fact**

Discussing the factual allegations in the indictment, the Government's press release ([ECF No. 46-1](#)) vacillates between reciting allegations and espousing fact. In the opening paragraphs, it describes:

- "Six people from Ohio were indicted for their roles in a health care fraud conspiracy . . . ."
- "All six are charged with conspiracy to commit health care fraud. . . ."
- "Additional counts include health care fraud, money laundering, [*etc.*] . . ."

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The fifth paragraph reads only, “According to the indictment:” It is followed by five paragraphs of description presented as unqualified fact. One of those following paragraphs recounts:

Between January 2015 and October 18, 2017, various defendants submitted or caused to be submitted billings to Medicaid for drug and alcohol services that were: coded to reflect a service more costly than was actually provided; without proper documentation; without proper assessment documents containing valid diagnosis; billings for patients whose records did not contain diagnosis by a physician; related to treatment at unlicensed inpatient beds; billings related to Bailey dispensing of Suboxone even though Bailey did not have the authority to do so; for case management services when, in fact, the clients were working out at Sheridan’s gym; billings based on quotas provided to the nurses by the defendants to bill four to five hours of treatment daily, even if the services were not medically necessary; billing for in-patient detox and drug treatment services that were, in fact, provided in an out-patient setting; among other violations.

The only suggestion that those assertions reflect anything less than proven fact occurs four paragraphs earlier, in the unadorned umbrella caveat: “According to the indictment:”

The press release continues by sharing comments of certain law-enforcement officials, listing the individual agents and attorneys involved in the investigation and pending prosecution, and noting that, if convicted, sentences will be tailored to each individual Defendant. The press release concludes by stating, “An indictment is only a charge, and the defendant is presumed innocent unless and until proven guilty beyond a reasonable doubt in a court of law.”

This format, in which a line reading “According to the indictment” is followed by several paragraphs of unqualified factual description, has been used repeatedly in press releases

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published by the U.S. Attorney's Office in this District.<sup>1</sup> See, e.g., [Press Release, \*Twenty-two people indicted for their roles in a conspiracy to traffic fentanyl\* . . . \(Mar. 13, 2019\)](#) (11 paragraphs of unqualified factual description following the phrase "According to the indictment"); [Press Release, \*Eleven people indicted for roles in conspiracy to distribute synthetic narcotics\* . . . \(Jan. 29, 2019\)](#) (five paragraphs of unqualified factual description following the phrase "According to the indictment"); [Press Release, \*Ohio man charged with attempting to provide material support to ISIS\* . . . \(Jan. 30, 2019\)](#) (12 paragraphs of unqualified factual description following the phrase "According to documents filed in court"); [Press Release, \*Westlake man indicted on charges he illegally accepted food stamps\* . . . \(Jan. 22, 2019\)](#) (10 paragraphs of unqualified factual description following the phrase "According to the six-count indictment").

#### **B. Press Release: Inflammatory Quotations**

After the recitation of allegations (that could be mistaken for facts), the Government's press release quotes several high-level law enforcement officials disparaging the Defendants and asserting their guilt, starting with the U.S. Attorney for the Northern District of Ohio. An official with the U.S. Department of Health and Human Services, Office of Inspector General weighs in

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<sup>1</sup> Not all U.S. Attorney's Offices write so suggestively. For example, in the Western District of Pennsylvania, the U.S. Attorney in February published a press release describing the indictment of an opioid treatment center owner. [Press Release, \*Johnstown Opioid Treatment Center Owner Indicted For Unlawfully Dispensing Controlled Substances\* . . . \(Feb. 6, 2019\)](#). That writing contains a thorough description of the allegations in the indictment, and every line is accompanied by a qualifier such as "the indictment alleges . . ." or "[the defendant] is also charged with . . ."

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next, and his comment is followed by those of the Special Agents in Charge at the FBI, IRS-Criminal Investigation, and DEA. The Ohio Attorney General's comments bookend the tirade.

In a television interview held the same day the press release was issued, U.S. Attorney's Office spokesman Michael Tobin also made comments disparaging the Defendants. *See* [ECF No. 46 at PageID#: 183](#).

### **C. Publications in Local Media and Public Reaction**

Local media outlets quoted extensively from the Government's press release. An article in the Vindicator, for example, republished the press release in its entirety save for the final admonition "An indictment is only a charge, and the defendant is presumed innocent unless and until proven guilty beyond a reasonable doubt in a court of law." *Compare* [ECF No. 46-1 with ECF No. 46-4](#). Excerpts of the press release and law-enforcement officials' comments were published in at least four other written media outlets, ECF Nos. [46-5](#), [46-6](#), [46-7](#), [46-8](#), and a television interview, *see* [ECF No. 46 at PageID#: 183](#).

The Government's statements did not go unnoticed. Some readers commented online in response. One wrote, referring to the Defendants, "Lock these disgusting losers up forever!" [ECF No. 46-9](#). Said another, "Disgusting. They were getting millions while people trying to break their addictions suffer. Scumbags[.]" [ECF No. 46-10 at PageID#: 225](#). Others wrote, "Look (sic) them up for a long time," and, "Lock these POS [pieces of shit] away." *Id.* at [PageID#: 227](#).

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### **III. Application**

Dr. Bailey argues that the Government's statements violated [Local Criminal Rule 57.1](#); [Ohio Prof. Cond. R. 3.6](#); and [Justice Manual §§ 1-7.500, 1-7.610, and 1-7.700](#), and consequently, that his right to fair administration of justice has been compromised.

#### **A. Impropriety of the Government's Statements**

The Justice Manual does not create substantive rights. Nevertheless, it is a helpful guide in assessing whether or not the Government's statements were proper according to its own rules.

The statements issued by the Government in its press release and at least one television interview plainly violated the terms of the Justice Manual. The press release presents harsh observations about the Defendants' character, and, despite several tepid caveats, it implies conclusions about the Defendants' guilt. *See* [Justice Manual § 1-7.610\(A\), \(F\)](#). In characterizing the Defendants with inflammatory language, the press release arguably also impugns the credibility of prospective witnesses. *See* [Justice Manual § 1-7.610\(D\)](#). The press release, both in its suggestive description of the indictment's allegations and in its quotations about the Defendants' character, went far beyond a description of (A) the Defendants' identifying information, (B) the substance of the charge, (C) the identity of the investigating agency and scope of the investigation, and (D) the circumstances immediately surrounding the arrests. *See* [Justice Manual §§ 1-7.500; 1-7.700\(B\)](#).



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At the hearing, Government counsel pointed out that the press release mentions on 18 occasions that the allegations are merely allegations, not proven facts.<sup>2</sup> That position, however, obscures the implications of guilt that are made obvious simply by reading the press release. First, there are five consecutive paragraphs of unqualified factual description following an unadorned qualifier: “According to the indictment:”. None of those paragraphs alludes to a charge, the indictment, an accusation, or the Defendants’ presumed innocence. Moreover, the factual descriptions are placed side by side with authoritative quotations that all but flatly assert the Defendants’ guilt.

The Government also suggests that the inflammatory quotations in the press release are not offensive or improper because they speak narrowly about “the societal costs associated with a particular *category* or *type* of case, rather than as comments on the guilt or innocence of the defendants here.” [ECF No. 58 at PageID#: 275](#). The Government’s assertion is perhaps accurate if one reads only one half of each quotation. But each quotation also comments directly on “these defendants” without any meaningful reference or allusion to their presumed innocence. It is perfectly proper, for instance, to comment, “IRS-CI is committed to collaboratively working to unravel complex fraud and money laundering schemes and ensuring those responsible are deprived of the fruits of these crimes.” It is improper, by contrast, for the Government to express opinions about the bad character and supposed guilt of unconvicted defendants.

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<sup>2</sup> Each mention of the term “indictment,” “charge,” “allegation,” or any similar word or variant is counted among the 18 supposed qualifiers.

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**B. Material Prejudice**

[Local Criminal Rule 57.1](#) and [Ohio Prof. Cond. R. 3.6](#) prohibit lawyers from disclosing certain information or opinions about a pending criminal matter. Both rules contemplate the Court's involvement in enforcing their regulations. See [United States v. Cutler, 815 F. Supp. 599, 608 \(E.D.N.Y. 1993\)](#) (citing the corresponding local criminal rule and ABA Model Rule of Professional Conduct 3.6); see also [Gentile v. State Bar of Nev., 501 U.S. 1030, 1074 \(1991\)](#) (“[C]ourt personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.” (quoting [Neb. Press Ass’n v. Stuart, 427 U.S. 539, 601 n.27 \(1976\)](#) (Brennan, J., concurring))).

[Local Criminal Rule 57.1](#) and [Ohio Prof. Cond. R. 3.6](#) are designed to shield defendants from improper statements that may interfere with their right to a fair trial. For that reason, both rules prohibit extrajudicial statements that pose a likelihood of material prejudice to the defendant or otherwise interfere with a fair trial. See [Gentile, 501 U.S. at 1075](#) (“Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.” (citations omitted)).

Dr. Bailey insists that he will be prejudiced by the Government's statements because those statements have infected the jury pool.<sup>3</sup> He points to four angry comments posted on the internet in response to a news story quoting the Government's statements, see ECF Nos. [46-9](#);

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<sup>3</sup> No other Defendant joined his motion.

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[46-10](#), and suggests that “it is almost inconceivable that there would be no improper influence on prospective jurors.” [ECF No. 46 at PageID#: 188](#). Dr. Bailey proposes eight potential remedies for that prejudice, among them a continuance of the trial date. [Id. at PageID#: 189-97](#).

The Government maintains that its statements were not improper, but even if they were, Dr. Bailey will not be materially prejudiced at trial. It argues that media coverage was “meager,” that any improperly influenced opinions among the eventual venire can be ferreted out during *voir dire*, and in any event, a trial continuance was likely to occur even in the absence of Dr. Bailey’s motion for sanctions.<sup>4</sup> [ECF No. 58 at PageID#: 277-79, 282](#).

Despite its disapproval of the Government’s tactic, the Court agrees there is no proof of lingering prejudice. Dr. Bailey points to only four anonymous online comments expressing hostility as a result of news stories about the indictment. That is hardly an outpouring of community anger.<sup>5</sup> The Court and parties are well equipped to identify members of the eventual venire who were improperly influenced and ensure those individuals are not impaneled on the *petit* jury. Additionally, the Court has already ordered a substantial continuance of the trial date. To whatever degree the Government’s statements improperly stirred up the community’s passions, those passions can be expected to dissipate over the course of the next six months.

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<sup>4</sup> At the March 25, 2019, hearing, for reasons unrelated to this motion, the Court continued trial by six months until October 21, 2019.

<sup>5</sup> In fact, the commentators almost immediately lost interest in the news of the indictment and focused their complaints on politics and “dollar store robbers.”

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#### **IV. Conclusion**

For the reasons stated above, Dr. Bailey's motion for sanctions ([ECF No. 46](#)) is denied. The Government shall not publish any further suggestive or inflammatory statements about this case prior to its conclusion, and should seriously reconsider its penchant for commenting about cases in which defendants have been charged but not convicted.

IT IS SO ORDERED.

March 28, 2019  
Date

/s/ Benita Y. Pearson  
Benita Y. Pearson  
United States District Judge